

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the Verizon Telephone)	
Companies for Declaratory Ruling or,)	
Alternatively, for Interim Waiver with)	
Regard to Broadband Services Provided)	
Via Fiber to the Premises)	WC Docket No. 04-242
)	
Conditional Petition of the Verizon)	
Telephone Companies for Forbearance)	
Under 47 U.S.C. § 160(c) with Regard to)	
Broadband Services Provided Via Fiber to)	
the Premises)	

OPPOSITION OF COVAD COMMUNICATIONS

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SUMMARY

Covad Communications, by its attorneys, herewith respectfully submits its opposition to the petitions for declaratory ruling, interim waiver and/or conditional forbearance of the Verizon Telephone Companies (Verizon) of the Commission's rules for fiber-to-the-premises facilities (FTTP). The Commission's decision to exempt mass market fiber-to-the-home (FTTH) deployments from unbundling requirements reflected the Commission's attempt to draw a balance between the Commission's stated goals of spurring next-generation facilities investment by incumbent LECs and allowing competitors access to last-mile transmission facilities. Unfortunately, in the *Triennial Review Order*,¹ the Commission chose without adequate record basis to grant incumbent LECs excessive deregulation in the name of spurring broadband deployment. The Commission provided even further deregulation to the incumbent LECs than allowing them to monopolize only true greenfield FTTH deployments, by declining to allow competitors access to the broadband transmission capabilities of FTTH deployments in overbuild, or "brownfield," situations, and even declining to allow competitors access to the broadband transmission capabilities of hybrid fiber-copper loops. Thus, the Commission's *Triennial Review Order* has already gone too far in allowing incumbents to monopolize critical last-mile broadband transmission facilities.

Nonetheless, the Commission's *Triennial Review Order* at least had the virtue of drawing a narrow, bright-line test for where such monopolization would be allowed. Construed broadly, Verizon's petitions here threaten to upset that balance, blurring the line between FTTH deployments and hybrid fiber-copper loops, and leading further down

¹ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

the slippery slope towards remonopolization of the last-mile transmission facilities critical to the delivery of broadband services. Furthermore, while these petitions masquerade as requests for unbundling relief for mass market fiber-to-the-premises (FTTP) deployments, construed broadly they threaten to dramatically expand, far beyond their stated purport, the scope of the unbundling relief provided to incumbent LECs in the Commission's *Triennial Review Order* – by sweeping in facilities used to serve enterprise locations.

Covad urges the Commission to reject Verizon's demands for even further deregulation beyond the wide-ranging exemptions from unbundling requirements already granted in the *Triennial Review Order*. In the alternative, if the Commission decides nonetheless to proceed with providing Verizon additional deregulation for FTTP deployments, the Commission must adopt the necessary limitations to narrowly tailor this deregulation to its stated goals. Otherwise, in the name of limited relief for FTTP loops, the Commission risks fully remonopolizing the critical last-mile transmission facilities on which mass market consumers and enterprise customers depend for competitive broadband services.

I. Introduction

Covad is the leading nationwide provider of broadband connectivity using digital subscriber line (DSL) technology. Covad's nationwide facilities-based broadband network reaches nearly 50% of the nation's homes and businesses. As a facilities-based provider, Covad relies on ILECs to provide unbundled transmission facilities (loops and interoffice transport) and the operations support systems (OSS) necessary to facilitate ordering and provisioning of such facilities. In addition, in order to connect customers to

its network, Covad is collocated in approximately two thousand central offices throughout the nation. Furthermore, as a facilities-based provider of broadband services in both the mass market and enterprise markets, Covad is uniquely affected by Verizon's requests for further deregulation of last-mile transmission facilities used to provide mass market and enterprise broadband services.

Verizon argues that the Commission should expand the already vast deregulation for broadband transmission facilities already provided in the Commission's *Triennial Review Order*, by creating "regulatory parity" for Verizon's FTTP deployments with cable platforms. Lest Verizon forget, however, in the *Triennial Review Order* the Commission has already provided wide exemptions from unbundling requirements for last-mile transmission facilities used to provide mass market broadband services. The Commission completely exempted incumbent LECs from providing access to the packetized broadband transmission capabilities of hybrid fiber-copper loops as UNEs.² The Commission completely exempted incumbent LECs from providing access to the broadband transmission capabilities of fiber-to-the-home loops as UNEs, in both new-build and overbuild situations.³ Furthermore, the Commission eliminated even its limited existing UNE rules for packet-switching,⁴ and limited competitors to accessing broadband transmission facilities in the enterprise market with legacy TDM-based interfaces.⁵ Finally, the Commission even decided to phase out and ultimately eliminate the most widely deployed means of providing competitive broadband services in the mass

² See *Triennial Review Order* at paras. 285-297.

³ See *Triennial Review Order* at paras. 273-284.

⁴ See *Triennial Review Order* at paras. 535-541.

⁵ See *Triennial Review Order* at paras. 298-342.

market, namely the UNE high frequency portion of the loop.⁶ By eliminating the line sharing UNE, the Commission decided to allow the incumbent LECs to *remonopolize* mass market broadband services for which competition had proven to be wildly successful. In sum, the Commission's *Triennial Review Order* already provides the incumbent LECs with a staggering amount of deregulation – for both mass market and enterprise loop facilities. Yet, despite winning such staggering deregulation of critical last-mile transmission facilities, Verizon arrives at the Commission asking for even more deregulation.

II. There is No Evidentiary Support for Further Deregulation

Both Verizon petitions must fail on one simple ground: neither provides any evidentiary support that further deregulation is warranted. Neither sets forth any evidentiary record support for the costs imposed on FTTP deployment by the nebulous regulatory burdens of which Verizon complains. Neither sets forth any economic analysis quantifying the additional FTTP deployment consumers can expect if the incumbent LECs are allowed to maintain monopolies over these last-mile transmission facilities. Furthermore, neither presents any economic analysis of the countervailing consumer surplus lost if the incumbent LECs obtain such monopoly deregulation, from the loss of access to service innovation and efficiencies brought about by competition.

In fact, Verizon's petition suggests that no further deregulation is needed to incent Verizon to deploy the FTTP network architectures at issue in its petition. As Verizon makes clear, Verizon has “already begun” its deployment of FTTP infrastructure, and plans to begin offering combinations of voice, video and data over its new FTTP

⁶ See *Triennial Review Order* at paras. 255-269.

infrastructure in less than two months.⁷ Verizon further makes clear that it has already announced the location of its first FTTP deployment, and that it already plans to announce additional locations soon, with the goal of offering FTTP in nine states passing one million homes by the end of the year.⁸ Needless to say, Verizon already appears to be at a fairly late stage in its rollout of FTTP infrastructure, and has been engaged in rolling it out notwithstanding the existence of the purportedly burdensome regulations of which it now complains. Moreover, during the lengthy planning and build-out stages of this FTTP deployment, Verizon can hardly claim that it had any reasonable reliance on the grant of the deregulation it comes seeking now in these petitions. It seems clear that, regardless of whatever regulations from which Verizon now claims to require relief, Verizon all along has had all the incentive it needs to deploy FTTP infrastructure and rollout new services over that infrastructure.

III. Verizon Seeks to Open Up a Slippery Slope of Remonopolization

The Commission must not allow itself to be fooled that Verizon seeks limited regulatory relief for FTTP facilities. Rather, by calling for “regulatory parity” with cable, Verizon’s petitions seek to open up a slippery slope of deregulation, which would enable incumbent LECs to restrict competitors from accessing even the limited set of broadband facilities allowed them under the restrictive terms of the *Triennial Review Order*. Critically, neither of the petitions even sets forth an ironclad definition of what such “regulatory parity” would mean. Instead, the petitions seem to sweep widely, encompassing any potential regulation that applies to incumbent LEC FTTP facilities. Moreover, neither of the petitions sets forth a precise definition of what is encompassed

⁷ See Verizon Petition for Declaratory Ruling at 2.

⁸ See Verizon Petitions, Memorandum of Additional Points and Authorities at 2.

under the rubric of FTTP facilities. What the petitions seem to aim at (without overtly saying so) is the deregulation of even the limited TDM access the *Triennial Review Order* preserves for competitors to serve enterprise customers.

The Commission must ask itself why Verizon even bothers in the first place to seek further deregulation of FTTP loop facilities. After all, as discussed above, the *Triennial Review Order* already provided incumbent LECs with staggering relief from unbundling requirements for facilities used to provide broadband services to mass market customers. The *Triennial Review Order* eliminates UNEs for line sharing and packet switching, and declines to adopt unbundling rules for the packetized transmission capabilities of hybrid fiber-copper loops. Thus, as far as broadband facilities used to serve the mass market are concerned, the incumbent LECs have essentially been freed from UNE unbundling requirements in most respects. Verizon attempts to carve-out a new category of loop types, so-called FTTP loops, so that FTTP loops aren't subjected to the presumably burdensome regulatory requirements attached loop architectures like hybrid fiber-copper loops. Yet, even for hybrid fiber-copper loops, the Commission declined to require UNE unbundling for broadband transmission capabilities used to serve the mass market. So what do the petitioners hope to achieve by carving out FTTP loops from wireline regulation anyway?

Of course, the most significant difference between UNE unbundling requirements for fiber-to-the-home loops and hybrid fiber-copper loops is that the Commission's *Triennial Review Order* declined to require the UNE unbundling of TDM transmission capabilities over FTTH loops, while it did require such unbundling for hybrid fiber-copper loops. The Commission should be exceedingly wary that Verizon's petition is not

simply a backdoor attempt to render competitors unable to access the TDM transmission capabilities of these loops as UNEs. By failing to identify clearly what loops are encompassed by FTTP loops, what Verizon really seeks may not be, as it claims, unbundling relief to serve mass market customers. Rather, in one form or another, what Verizon really seeks may simply be the deregulation of the loop facilities used to serve enterprise customers. Accordingly, as discussed below, the Commission should adopt clear technical parameters defining the FTTP loops for which it provides Verizon any of its requested deregulation.

IV. Any FTTP Loop Relief Must Be Appropriately, Narrowly Limited

For the reasons given above, Covad believes that Verizon has not provided sufficient support for the Commission to grant the relief requested in these petitions. Accordingly, the Commission should immediately deny Verizon's petitions for declaratory ruling, interim waiver and/or conditional forbearance. If the Commission decides nonetheless to proceed with granting some form of FTTP loop unbundling relief, the Commission should be very clear in construing the relief it grants narrowly.

a. The Commission Should Refrain from Designating Broadband Transmission Services over Verizon's FTTP Infrastructure as "Information Services"

Verizon asks the Commission to grant its broadband transmission services over FTTP the same "information services" designation it previously granted to cable modem services in the *Cable Modem Declaratory Ruling*.⁹ How the Commission could proceed to extend its determination in the *Cable Modem Declaratory Ruling* at this juncture is a

⁹ See Verizon Petitions, Memorandum of Additional Points and Authorities at 3.

mystery. As even Verizon acknowledges,¹⁰ the Commission’s determination that cable modem services are information services has been reversed and vacated by the U.S. Court of Appeals for the Ninth Circuit.¹¹ Indeed, it is clear that Verizon’s request for an “information service” designation for its FTTP infrastructure is a transparent attempt to avoid the proceeding on remand that the Commission must now conduct to respond to the 9th Circuit’s decision, absent any further decision on appeal. In light of this very clear reversal of the Commission’s previous designation of cable modem services as information services, it would be extreme folly for the Commission to prejudice the outcome of its remand proceeding by granting Verizon the same designation for its FTTP infrastructure.

Furthermore, Verizon’s request for an “information services” designation would prejudice the Commission’s pending proceeding examining this issue. In its *Broadband NPRM*, the Commission is considering the statutory classification of wireline Internet access services and the appropriate regulatory framework for those services. Specifically, the Commission is considering whether those services are “telecommunications services” or “information services” under the Telecom Act. The Commission tentatively concluded that “when an entity provides wireline broadband Internet access service over its own transmission facilities, [it] is an information service under the Act [and] ... that the transmission component of retail wireline broadband Internet access service provided over an entity’s own facilities is ‘telecommunications’ and not a ‘telecommunications

¹⁰ *See id.*

¹¹ *See Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*), vacated in part in *Brand X Internet v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

service.”¹² In focusing on the definition of these services, the Commission is contemplating to what extent the ILECs should be subject to common carrier regulations for their broadband transmission services. Thus, it is clear that Verizon’s request for an “information services” designation is simply a backdoor attempt to prejudice the outcome of this still pending proceeding.

Instead of falling for this ploy, the Commission should continue to resolve the regulatory classification of incumbent LEC broadband services in the course of these pending proceedings and the Commission’s probable remand proceeding to respond to the 9th Circuit’s decision in *Brand X*. In the meantime, the Commission should refrain from designating the broadband transmission services offered over Verizon’s FTTP infrastructure as information services.

b. Any Additional Deregulation Should Be Limited to the Commission’s Computer II/III Unbundling Requirements

Verizon claims that it requires additional relief for FTTP loops because of the need to incent additional fiber deployment in the mass market. Yet, the only specific regulatory requirement of which Verizon complains in its petitions is the requirement to provide its basic transmission services to ISPs on cost-based terms and conditions under a separate tariff.¹³ Given that this requirement, arising out of the Commission’s *Computer II/III Inquiries*, is the only specific regulatory requirement of which Verizon complains, the Commission should make clear that any further deregulation it grants to Verizon is

¹² See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, WC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42, 17 FCC Rcd 3019, ¶ 17 (2002) (*Broadband NPRM*).

¹³ See Verizon Petitions, Attachment Memorandum of Points and Authorities at 1. See also *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 428, para. 114 (1980) (*Computer II Final Decision*).

limited to removing the broadband transmission services offered over Verizon's FTTP infrastructure from the application of the Commission's *Computer II/III* requirements.

Covad does not, however, take any position as to whether Verizon has made the requisite showing to obtain such relief (whether through section 10 forbearance or an interim waiver). Rather, Covad believes that, if the Commission does decide to grant Verizon additional deregulation, such deregulation should be limited only to the specific regulatory requirements of which Verizon complains in its petition. The Commission (and commenters) should not be forced into a guessing game to determine for Verizon exactly which regulations should be lifted in the name of Verizon obtaining so-called regulatory "parity" with cable. Rather, Verizon should be held to the express terms of its petition, which solely reference a request for relief from the *Computer II/III* requirement to offer a separate basic transmission service on non-discriminatory, cost-based terms and conditions.

Should the Commission proceed down such a path (on the merits of which Covad takes no position), it should be exceedingly careful to do so in a way that does not prejudice the outcomes of the aforementioned *Wireline Broadband NPRM* and probable *Cable Modem Declaratory Ruling* remand proceedings. In other words, any relief the Commission deems is appropriate for Verizon from the specific requirements of *Computer II/III* should not include a determination that Verizon's broadband transmission services over FTTP infrastructure are comprised of an "information service." Rather, the Commission should narrowly craft any relief that it grants from *Computer II/III* requirements to relieve solely the separate tariffing requirements for a

basic transmission service, without making any determinations on the appropriate regulatory classification of that underlying basic transmission service.

c. Any FTTP Deregulation Should Adopt Clear Technical Parameters for Qualifying Loops and the Services Provided Over Those Loops

Similarly, the Commission should not allow Verizon to use additional FTTP deregulation to blur the line between deregulated FTTP loops and hybrid fiber-copper loops, which do not qualify for such deregulation. Accordingly, should the Commission determine that it will provide Verizon any of its requested deregulation, the Commission should simultaneously adopt clear, rigid technical standards for the loops that qualify for deregulation as FTTP loops. Specifically, the Commission should require that loops be deregulated as FTTP loops only where (1) the FTTP loop actually consists of fiber all the way to a mass market customer's premises and delivers the same level of bandwidth to individual customer locations as other fiber to the home loops according to industry standards currently in place; AND (2) that a particular loop deployment is capable of and actually offered to customers as delivering the "triple play" of services made possible in a mass market fiber-to-the-home deployment, namely voice services, data services, and multichannel digital video services comparable to commonly available intermodal multichannel video services (*e.g.*, via cable and satellite television). The latter requirement is particularly important to ensure that incumbent LECs do not blur the line between FTTP loops truly serving mass market customers (and therefore delivering mass market services such as multichannel video) with high capacity loops serving enterprise customers.

To ensure that Verizon and other incumbent LECs cannot unilaterally simply claim that a particular FTTP loop deployment meets these criteria, state commissions

should conduct the fact-finding necessary to establish conclusively whether or not these technical parameters are met by a particular FTTP loop deployment. Similarly, the burden of proof should be on the incumbent LEC to establish that a particular FTTP loop deployment individually meets these technical parameters.

V. Conclusion

The Commission's *Triennial Review Order* already grants the incumbent LECs wide-ranging, staggering deregulation for their facilities used to provide broadband services. Particularly in the mass market, incumbent LECs have been relieved of just about every requirement to provide UNE access to broadband transmission facilities already; in the mass market, competitors do not retain access to the broadband transmission capabilities of FTTH, hybrid fiber-copper loops, or even line sharing. Accordingly, there is no basis here for granting even more deregulation of loop facilities to the incumbent LECs. Certainly, the Commission must not allow the incumbent LECs to perpetrate the ruse of gaining additional deregulation for facilities used to serve enterprise customers, all in the name of "parity" deregulation for FTTP.

If the Commission decides, nonetheless, to grant Verizon additional relief for FTTP infrastructure, it must ensure that this deregulation is appropriately, narrowly tailored to achieve Verizon's purported aims by adopting the limitations set forth herein.

Respectfully submitted,

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